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No. 82-1029

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH S. IVERY,
Petitioner

-VS-

UNITED STATES OF AMERICA,
Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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Several matters in the Solicitor General's Brief in Opposition call for a reply.

STATEMENT OF THE CASE

The Solicitor General's brief stated as undisputed fact conclusions some matters which cannot be such in this case for, here, there has yet to be a contested factual hearing.

The Solicitor General, in his Statement, (paragraph 1) as did the Court of Appeals for the Sixth Circuit, in its opinion, has taken determinations of the Arbitrator in the labor-management grievance procedure and stated them as facts. The sole issue, here, is whether these determinations are a bar to the prosecution of a claim grounded in rights given by the Congress in the Federal Tort Claims Act. Such statements assume the unquestioned accuracy of the determinations of the Arbitrator. Statements as to how petitioner became the subject of an investigation, what the postal inspectors did during the investigation and what they found or didn't find during the investigative routine and on petitioner's arrest are conclusions of the Arbitrator, and to state them as fact is unwarranted and, within the frame work of this litigation, misleading.

In the second paragraph of what the Solicitor General identifies as 2 of the Statement (Brief in Opposition, p 3) it is stated that an element of petitioner's claim, absence of probable cause, was decided adversely to petitioner in the arbitration proceeding and that acquittal on litigation of the criminal charge did not detract from the finding. This accurately describes what occurred in the Opinion of the Court of Appeals. However, it again shows that the Solicitor General and the Court of Appeals wish this case to be resolved by the conclusions of the Arbitrator when the question presently to be resolved is—must it be so resolved without a contested factual hearing in District Court?

ARGUMENT

The Solicitor General contends that we make an over broad reading of this Court's decision in *Alexander* v *Gardner-Denver Co.*, 415 U.S. 36 (1974). He contends that the decision, there, was limited to situations of federal statutes creating independent substantive rights where Congress intended to provide parallel or over lapping remedies separate from the processes of collective bargaining.

We do not believe that our reading of *Gardner-Denver* is over broad. Rather, it is consistant with what this Court believed to be its holding when *Barrentine* v *Arkansas-Best Freight Systems*, 450 U.S. 728 (1981) was decided. The decisional language of *Barrentine* was:

"As we stated in *Gardner-Denver:*

> 'In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under [the statute], an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result

> of the same factual occurrence. And certainly no inconsistancy results from permitting both rights to be enforced in their respectively appropriate forums.' (Citation omitted)
>
> *Reversed.*"

Barrentine v *Arkansas-Best Freight Systems*, supra at pp 745-746.

We submit that when this Court decided *Kremer* v *Chemical Const. Corp*, _____U.S._____; 102 S Ct 1883 (1982) the Court indicated that the separate and distinct nature of the rights was the primary basis for the *Gardner-Denver* decision, as the dissenters in *Gardner-Denver* joined in the majority opinion of Mr. Justice White which said:

> "Our decision in *Gardner-Denver* explicitly recognized the 'distinctly separate nature of these contractual and statutory rights.' " *Kremer* v *Chemical Const. Corp.*, supra at p 1895.

The majority opinion in *Kremer*, supra, also pointed out that arbitration was not an appropriate forum to effectuate the requirements of enacted legislation, but was rather, a forum to effectuate the intent of parties to a contract. We submit that by holding the arbitration decision a bar the Court of Appeals, without contractual or legislative authority, seeks to amend the collective bargaining agreement and the Tort Claims Act.

While both the majority and the dissenters in *Kremer*, supra, were of the opinion that the decision in *Gardner-Denver* was based, in part, upon the inappropriateness of a forum other than a federal court to decide claims created by federal statute, it is quite apparent that the majority believed that arbitration, by its nature contractual, was inherently inappropriate. The dissenters did not disagree. They felt that state administrative agencies and reviewing courts

could also be inappropriate forums for the resolution of claims created by federal statute.

The argument that petitioner did not receive his right to bring this action by enactment of federal statute, but was only provided a remedy by federal statute, is specious. The existance of governmental immunity determined that there were no rights against the government and this was true from the time English nobles wrested the Great Charter from King John until statutory enactments created causes of action against the government. To argue that all that was done by statutes creating causes of action against the state was the giving of a remedy for a right that had existed is arcane and not in keeping with reality.

Even if the mysterious nature of the source of petitioner's right that is proffered by the Solicitor General, here, is accepted, it does not show that petitioner's right was not created by Congress. When the initial Federal Tort Claims Act was enacted in 1946 it provided for a broad grant of rights but made numerous exceptions, many of which related to the intentional torts of government employees. In short, it was the legislative scheme to grant broad rights and then take some away by legislatively spelling out exceptions. Here, an exception regarding the intentional torts of certain government employees was removed in 1974 by enacting a special proviso that granted a right on and after the date of enactment of the proviso. There was no right before the enactment of the proviso. Enacting the proviso created the right.

Lastly, the Solicitor General argues that there is no indication in the Arbitrator's decision that the "law of the shop" played any part in the arbitration decision adverse to the petitioner. We submit that the teachings of *Gardner-Denver, Barrentine* and *Kremer* are that the "law of the shop" is, inherently, a part of a collective bargaining arbitration. Here, when the arbitrator said:

"The sanctity of the mail must be inviolate, . . ." (6a),

it is clearly demonstrated that the "law of the shop", inherent in every collective bargaining arbitration, coloring its determinations, was an expressed part of the arbitration determination in this case.

The Court of Appeals for the Sixth Circuit has, four times, recognized that an adverse arbitration decision will not bar a federal court trial of a claim based upon rights granted by federal statute. The four claimants in these cases were equally protected by the law, as were the numerous claimants that brought similar claims for review in the several other Courts of Appeal. Petitioner stands alone in not having his claim, created by federal statute, afforded a federal court trial. Quite literally, the District Court and the Court of Appeals, here, have denied petitioner the equal protection of the law.

WHEREFORE, Petitioner prays that this petition for certiorari be granted, or, alternatively, that summary disposition on the merits pursuant to Supreme Court Rule 23 be made and the case be remanded to District Court for trial.

Respectfully submitted,
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